APPENDIX A

SUMMARY OF OCCASIONS WHEN THE LEGISLATIVE HAS SOUGHT TO COMPEL THE EXECUTIVE TO PRODUCE CONFIDENTIAL DOCUMENTS

In March of 1792, the House of Representatives passed the following resolution:

> "Resolved, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries." 3 Annals of Congress, p. 493.

The expedition of General St. Clair had been under the direction of the Secretary of War and the assertion of the House of Representatives of its rights to investigate was predicated upon its control of the expenditure of public monies. The Secretaries of War and Treasury apparently appeared in person before the committee. However, when President Washington himself was asked for the papers pertaining to the General St. Clair campaign, a cabinet meeting was called at which it was unanimously concluded that the President should communicate only such papers as the public good would permit and should refuse disclosure of those which would injure the public. All but Secretary of the Treasury Alexander Hamilton believed this doctrine applied as well to Heads of Departments who come under the President.

In 1796, President Washington was presented with a House resolution requesting that the House be shown a copy of the instructions to the U. S. Minister who negotiated the peace treaty with Great Britain together with related documents and correspondence. The House was insisting upon examination of these papers as a condition precedent to appropriating funds to implement the treaty.

Washington addressed a message to the House in which he discussed the requisites of secrecy in international intercourse and expressed the feeling that admission of the House of Representatives into the treaty making process would create dangerous precedence. He concluded the address by a categoric refusal to divulge the information requested.

In January 1807, during Jefferson's administration, Representative Randolph introduced the following resolution:

> "Resolved, That, the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any

illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same." 16 Annals of Congress (1806-1807), p. 336.

This resolution was overwhelmingly passed at a time when the Burr conspiracy was stirring the country. Jefferson's message to the Senate and House provided a summary of recent events and then with respect to the accumulation of data in his hands stated: "...In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question." Richardson, Messages and Papers of the Presidents, Vol. I, p. 412, dated January 22, 1807.

On three different occasions President Andrew Jackson successfully resisted attempts by the House and Senate to extract information and papers of the Executive considered to be confidential. The first of these was a request for a copy of a paper which had been published and allegedly read by the Executive to the Heads of the Departments. The second was a request for information in connection with the investigation by the Senate respecting frauds in the sale of public lands. The third was a request in connection with a House resolution to investigate the condition of the Executive Department concerning their integrity and efficiency.

In 1842 during John Tyler's administration, the principle was established that all papers and documents relating to applications for office are of a confidential nature, and an appeal to a President to make such records public should be refused. Tyler abjectly denied a request to communicate to the House the names of such members of the 26th and 27th Congresses as had applied for office, and for what offices, and whether in person or by writing or through friends.

President Tyler was successful on a later occasion in withholding confidential information from the House in connection with an inquiry into reports relative to the affairs of the Cherokee Indians and frauds alleged to have been practiced upon them. In a message to the House dated January 31, 1843, he stated:

"...The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed' necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of

falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at one of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive." Hinds, Precedents of the House of Representatives, Volumn 3, p. 181 (1907)

A few years later during James K. Polk's administration a resolution of the House of Representatives requested the President to furnish the House an account of all payments made on the President's certificates, with copies of all memoranda regarding evidence of such payments, through the agency of the State Department, for the contingent expenses of foreign intercourse from March 4, 1841, until the retirement of Daniel Webster from the Department of State. In 1841, John Tyler was President with Webster his Secretary of State. The request, therefore, was for the details of certain payments made by the State Department during the preceding administration.

Polk replied to the request:

"An important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be 'made public.' If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not." Richardson, Messages and Papers of the Presidents, Vol. IV, p. 433.

This action illustrates the principle that what a past President has done, whether or not by law he was entitled to keep it confidential, a subsequent President will not reveal. President Polk felt obliged to maintain secrecy because of the dangers of precedence despite strong public feeling then existing against secrecy of any kind in the administration of the government, especially in matters of public expenditures. Polk was able to point to a law that had enabled his predecessors in office, in the public interest, to keep expenditures of a certain kind secret in nature. Congress, of course, could have repealed the law had it chosen to do so.

President James Buchanan on March 28, 1860 was compelled to protest an attempt by the House of Representatives to investigate whether any means of influence had been brought to bear upon the Congress for or against the passage of any law relating to the rights of any state or territory.

In April 1876, President Grant fought a hostile House inquiry into the discharge of his purely Executive office acts and duties. Grant recognized the constitutional authority given the House of Representatives to require of the Executive information necessary for legislation or impeachment. The inquiry involved was not for legislative purposes, and if for impeachment, Grant objected that it was an attempt to deny him the basic right not to be a witness against himself. It became evident that the House request was a political move to embarrass the President by reason of his having spent some hot months at Long Branch.

During the first administration of Grofer Cleveland the great debate on "Relations Between the Senate and Executive Departments" took place. The debate arose out of Cleveland's dismissal from office of approximately 650 persons in the Executive branch. Cleveland disclaimed any intent to withhold official papers, but he denied that papers and documents inherently private or confidential, addressed to the President or a Head of a Department, having reference to an act entirely Executive, were changed in their nature and became official when placed for convenience in custody of public departments. Concerning such papers the President felt that he could with entire propriety destroy them or take them into his own personal custody. Cleveland won his victory. His action established a precedent for setting apart for the first time private papers in the Executive Departments from public documents. The President was the one who established the character of the papers.

President Theodore Roosevelt proved successful in his resistance to a Senate resolution calling for the production of all documents in connection with federal anti-trust actions. Roosevelt refused to disclose the reasons why particular actions had not been taken. The Senate was equally thwarted in its attempt to get its information from two heads of departments. Subsequently there was introduced the following resolution in the Senate.

"Resolved by the Senate, That any and every public document, paper, or record, or copy thereof, on the files of any department of the Government relating to any subject whatever over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the offices of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction." 43 Cong. Rec. 839 (1909).

Out of the lively debate that ensued the following points seem to be established:

1. That there was no law which compelled heads of departments to give information and papers to Congress.

2. That if a head of a department refused to obey a subpoena of either of the Houses of Congress, there was no effective punishment which Congress could mete out.

The resolution never came to a vote.

President Coolidge in 1924 was compelled to thwart a Senatorial attempt to vent a personal grievance on the Secretary of the Treasury by ostensibly obtaining information from him upon which to recommend reforms in the law and in the administration of the Internal Revenue. Mr. Coolidge in a special message to the Senate dated April 11, 1924 stated it was recognized both by law and custom that there was certain confidential information which it would be detrimental to the public service to reveal.

In June of 1930 the Senate Foreign Relations Committee sought from the Secretary of State confidential telegrams and letters leading up to the London conference and treaty. Secretary Stimson provided such information as he could which evidently fell short of satisfying the committee. A resolution of the committee to the effect that it regarded all facts which entered into the antecedent and negotiations of any treaty as relevant and pertinent when question of ratification was involved. A message from President Hoover to the Senate on July 11, 1930 culminated this lengthy bitter debate. In this he pointed out the number of informal statements and reports given our government in confidence. To publish such statements and reports would be a breach of trust of which the Executive should not be guilty. The debate wound up in the adoption of a face-saving resolution by Senator Morris.

The administration of Franklin D. Roosevelt affords numerous instances of legislative attempts to obtain confidential executive papers. The first of these occurred in May of 1935. The President successfully avoided a precedent of sending to the Congress the text of remarks made at a bi-weekly press conference.

In April of 1941, Attorney General Jackson was requested by the Chairman of the House Committee on Naval Affairs to furnish all Federal Bureau of Investigation reports since June 1939, together with "all future reports, memoranda, and correspondence, of the Federal Bureau of Investigation, or the Department of Justice, in connection with investigations made by the Department of Justice arising out of strikes, subversive activities in connection with labor disputes or labor disturbances of any kind in industrial establishments which have Naval contracts, either as prime contractors or subcontractors.

Attorney General Jackson's opinion, printed in 40 Op. A. G. 45 (April 30, 1941), stated in part:

"It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest..."

"Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

"Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants--sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard this keeping of faith with confidential informants as an indispensable condition of future efficiency." 40 Op. A. G. 45, 46, 47.

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"This discretion in the executive branch (to withhold confidential information) has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." (40 Op. A. G. 45, 49)

Accordingly Jackson refused to divulge the requested information.

On January 20, 1944 at the Hearing before the Select Committee to Investigate the FCC, the Director of the Federal Bureau of Investigation called upon to testify, was sustained by the Committee Chairman in his claim of privilege not to testify as to certain mat-

ters on which the President had directed him to remain silent. The Chairman suggested to the Committee Counsel that he interrogate Mr. Hoover on other matters. As to these, Mr. Hoover still refused to testify; the Chairman then pointedly ordered Mr. Hoover to answer questions put to him by the Counsel. Again Mr. Hoover obdurately refused. The record of the hearings is silent as to any action taken by the committee following Mr. Hoover's refusal.

This same special Committee on another occasion sought the production of records and testimony from the various Heads of Departments and Directors of Agencies. On each occasion the President or his cabinet members or Heads of Departments exercised their own discretion concerning the propriety of furnishing testimony and papers. Where there was refusal, the Committee thought it wise not to press the issue.

In the autumn of 1945 when the tragedy of Pearl Harbor was the object of legislative scrutiny the Joint Congressional Committee attempted to elicit from subpoenaed witnesses information regarding the Cryptanalytic Unit. The President did everything possible to assist the investigation recognizing the public desire for full and complete disclosure. A minority of the committee believed that the President was imposing restraints on those whom he allowed to appear. To an extent this was true because the President quite evidently assumed responsibility of guiding and directing the Heads of the Departments concerning the oral testimony and written material which they were to furnish the Committee. In so doing, Mr. Truman was exercising historically precedented executive prerogative.

In 1948 the House of Representatives passed House Joint Resolution 342 directing all executive departments and agencies of the Federal Government to make available to any and all committees of the House of Representatives, and the Senate, any information which might be deemed necessary to enable them to properly perform the duties delegated to them by the Congress. This resolution never came to a vote in the Senate.